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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RELIANCE MORTGAGE CORPORATION,
A COLORADO CORPORATION,

Petitioner,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, AN ILLINOIS CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

Respectfully submitted,

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States District Court for the Northern District of Illinois, Eastern Division, and the Seventh Circuit Court of Appeals erred in ruling that a claim seeking a declaratory judgment under 28 U.S.C. §2201 is not an independent cause of action.

2. Alternatively, whether the allegations of the Amended Complaint filed by the Plaintiff-Appellant, Reliance Mortgage Corporation (hereinafter referred to as "Reliance") state an underlying claim for breach of contract or breach of trust so as to authorize a federal court to render a declaratory judgment under 28 U.S.C. §2201 as to the rights of Reliance with respect to a 1.004 million dollar Certificate of Deposit and interest thereon which is in the possession of and has been appropriated by the Defendant-Appellee, Continental Illinois National Bank (hereinafter referred to as "Continental").

3. Whether the United States District Court for the Northern District of Illinois, Eastern Division, and the Seventh Circuit Court of Appeals erred in ruling that the Amended Complaint filed by Reliance states no claims upon which relief may be granted under the standard of review as established by this Court in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974).

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PETITION FOR A WRIT OF CERTIORARI TO THE SEVENTH CIRCUIT COURT OF APPEALS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Reliance Mortgage Corporation, the Petitioner herein, prays that a Writ of Certiorari issue to review the Order of the Seventh Circuit Court of Appeals entered on January 26, 1984 in the above-entitled case.

PARTIES TO THE PROCEEDING

The parties to this action are Reliance Mortgage Corporation, a Colorado corporation, and Continental Illinois National Bank and Trust Company of Chicago, an Illinois corporation.

Reliance Mortgage Corporation has no parent companies, subsidiaries nor affiliates.

PREVIOUS OPINIONS

The opinions of the United States District Court for the Northern District of Illinois, Eastern Division, and the Seventh Circuit Court of Appeals dismissing the Amended Complaint of Reliance for failure to state a claim upon which relief may be granted have not been reported either officially or unofficially to the best of counsel's knowledge. Copies of such opinions are contained in the Appendix.

STATEMENT OF JURISDICTION

Reliance seeks review of the Order of January 26, 1984 from the Seventh Circuit Court of Appeals wherein that Court affirmed the decision of the United States District Court for the Northern District of Illinois, Eastern Division, which ruled on March 4, 1983 that the Amended Complaint of Reliance failed to state a claim upon which relief could be granted. Reliance did not seek a rehearing from the Seventh Circuit Court of Appeals and no extension of time has been sought within which to petition for certiorari before this Court.

This Court has jurisdiction to review the Order of the Seventh Circuit Court of Appeals by virtue of 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c) inasmuch as the within matter is a civil action and less than ninety (90) days have elapsed since the entry of the Order which is presented for review.

STATUTES INVOLVED IN THE CASE

The primary statute which Reliance seeks to have this Court interpret is 28 U.S.C. §2201 which states in full:

> In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 [26 U.S.C. §7428], or a proceeding under section 505 or 1146 of Title 11 [11 U.S.C. §505 or 1146], any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

One of Reliance's other claims for relief deals with 12 U.S.C. §1972 which provides in relevant part:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing, on the condition or requirement—
>
> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>
> (B) . . . ;
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) . . . ; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank . . . .

STATEMENT OF THE CASE

At all times relevant to the matters contained herein, Reliance was engaged in the mortgage banking business. In May of 1979 a series of circumstances caused banks and securities dealers with whom Reliance had accounts to feel insecure concerning the position of Reliance in the Government National Mortgage Association securities market and they therefore accelerated the indebtedness of Reliance to them. As of May 15, 1979, Continental was the only bank which would agree to purchase loans from Reliance.

During that same period of time, Continental advised Reliance that Continental wished to extend credit to Reliance and purchase loans from Reliance together with the servicing for such loans in order to enlarge the servicing portfolio which Continental possessed. Continental also advised Reliance that Reliance should deposit any and all profits from the sale of such mortgages into an account at Continental so that other banks and securities dealers would not be able to offset Reliance's accounts against Reliance's debts.

On May 17, 1979, Reliance and Continental entered into an Agreement forming the basis for the extension of credit to Reliance and the purchase of loans from Reliance by Continental. At approximately the same time, Reliance opened two banks accounts at Continental. Shortly after those accounts were established, Continental unilaterally inserted its own name as co-holder of an account known as a "cash collateral account" so that Reliance could not withdraw any of its profits or funds without permission of Continental. Continental also thereafter wrongfully withheld funds belonging to Reliance that had been earned by Reliance in the sale of mortgages to Continental from March 17, 1979 through December 31, 1979. Furthermore, Continental also wrongfully cancelled commitments to purchase loans from Reliance.

Continental continued to withhold profits belonging to Reliance and threatened to continue to withhold such profits

and to drive Reliance into bankruptcy unless Reliance would sign the February 1, 1980 Agreement whereby Reliance would relinquish substantial profits it had earned due to changes in interest rates. Throughout this time Reliance was uncertain as to whether it was solvent at any given time due to the unilateral actions of Continental in withholding profits and funding for the loan commitments. Throughout this period of time Continental also realized it was the only source of funds for Reliance and that the withholding of profits or funding for loan commitments could place Reliance into bankruptcy. Reliance acceded to Continental's threats and executed the February 1, 1980 Agreement.

The February 1, 1980 Agreement required both parties to perform an accounting as to amounts due and owing to each other. Continental, however, ignored that Agreement and continued to withhold profits from Reliance; refused all requests by Reliance for an accounting of the funds due and owing between the parties; and thwarted all of Reliance's efforts after February 1, 1980 to find a new source of credit and purchaser of loans. Rather than tender an accounting, Continental instead required Reliance to execute a document on May 9, 1980 whereby Reliance would receive only a fraction of what was believed to be due and owing to it. Throughout the period of time when the February and May, 1980 Agreements were signed, Continental had improperly obtained sufficient economic power over Reliance to enable it to drive Reliance out of business. Continental continually threatened to exercise this power if Reliance would not release all claims it had against Continental. The February and May 1980 Agreements contain such a release.

In December of 1979, prior to both of the Agreements being executed, Reliance had entered into an agreement with certain creditors to structure repayment by Reliance of its indebtedness to such creditors. As part of that agreement, Reliance was to place funds of approximately one million dollars into the form of a Certificate of Deposit so as to secure its obligations to those creditors. If Reliance could satisfy its

indebtedness to those creditors or if other satisfactory arrangements could be made, Reliance would be entitled to the return of the Certificate of Deposit plus accrued interest. The Certificate of Deposit was ultimately placed by Reliance at Continental, not because it was a creditor of Reliance, but because Continental threatened to sabotage the agreement between Reliance and its creditors and to cease making further purchases of loans from Reliance regardless of its commitments unless Continental obtained the Certificate of Deposit.

In February of 1981, Continental confirmed to an independent certified public accountant that the Certificate of Deposit and accrued interest thereon was being held for the benefit of Reliance. Notwithstanding that commitment, during the fall of 1981, Continental, without notice or explanation, ceased to confirm to Reliance or its creditors the existence of the Certificate of Deposit or that the Certificate of Deposit was being held for Reliance's benefit. From the fall of 1981 through March 31, 1982, Reliance repeatedly contacted Continental seeking an explanation for the failure of Continental to acknowledge the Certificate of Deposit and accrued interest thereon. On or about March 31, 1982, representatives of Continental advised Reliance that the Certificate of Deposit and accrued interest thereon had been taken as an offset to amounts "mistakenly" paid to Reliance under the May 9, 1980 Agreement. This action was filed a week later.

The original Complaint in this action was filed on April 8, 1982. Continental moved to dismiss that pleading and its Motion was granted on September 7, 1982. An Amended Complaint was filed on or about December 6, 1982 and Continental once again moved to have that pleading dismissed under Rule 12(b)(6) under the Federal Rules of Civil Procedure. On March 4, 1983, that Motion was granted. Reliance sought review of the District Court's Order in the Seventh

Circuit Court of Appeals and on January 26, 1984, the Seventh Circuit Court of Appeals affirmed the District Court's Order.

The Amended Complaint asserts eleven claims for relief. The first three counts seek to set aside certain Agreements between the parties made in February and May of 1980 pursuant to which, *inter alia*, Reliance released Continental from prior claims. Reliance asserts that those Agreements are voidable due to duress, undue influence and unconscionability. The next four counts (claims four through seven) assert claims based upon the parties' prior dealings which were the subject of the release provisions of the Agreements which are sought to be set aside in the first three claims.

The eighth through tenth counts pertain to the Certificate of Deposit and accrued interest thereon which was placed by Reliance with Continental in December of 1979. These claims arose subsequent to the execution of the Agreements which were sought to be set aside in the first three counts. The eighth claim for relief seeks a declaratory judgment as to the parties' rights in the Certificate of Deposit and accrued interest thereon. The ninth and tenth claims seek money damages for breach of contract and breach of trust arising out of Continental's actions in appropriating the Certificate of Deposit. Count eleven seeks an award of exemplary damages.

The Seventh Circuit Court of Appeals found that none of the first three claims for relief seeking rescission of the February and May 1980 Agreements could possibly be supported by any set of facts. That Court also found that no facts supported the claims set forth in the fourth through seventh counts. The eighth claim for relief seeking a declaratory judgment was found to be deficient, "because Reliance failed to state any proper claims for relief regarding the Certificate of Deposit . . . . " The Seventh Circuit Court of Appeals further stated that, " . . . a declaratory judgment is an alternative form of relief, not an independent cause of action." This

statement of law, without legal citation, occurs after the Seventh Circuit Court of Appeals found that the breach of trust allegations were conclusory and without the support of any facts and that the breach of contract allegations in the tenth claim for relief were barred by the May, 1980 Settlement Agreement.

Finally, the District Court's jurisdiction was conferred by 28 U.S.C. §1332 and, with respect to the one federal claim under 12 U.S.C. §1972, by 28 U.S.C. §1331.

REASONS FOR GRANTING WRIT

I. THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN RULING THAT A CLAIM SEEKING A DECLARATORY JUDGMENT UNDER 28 U.S.C. §2201 IS NOT AN INDEPENDENT CAUSE OF ACTION.

As noted in the Statement of the Case contained herein, the Amended Complaint filed by Reliance sought to have a declaratory judgment rendered whereby Reliance would obtain a declaration of its rights and legal relations with regard to a 1.004 million dollar Certificate of Deposit which was placed with Continental.

The Certificate of Deposit was placed with Continental in 1979 after Reliance had reached an agreement with its creditors. That agreement gave those creditors a security interest in the Certificate of Deposit. Reliance has alleged that Continental was holding such Certificate of Deposit for the benefit of Reliance and its creditors. On or about February 27, 1981, Continental confirmed to an independent certified public accountant that the Certificate of Deposit and accrued interest thereon was in fact being held for the benefit of Reliance's creditors. However, in the fall of 1981 Continental ceased confirming the existence of the Certificate of Deposit and accrued interest thereon. Reliance made

numerous demands upon Continental seeking to be advised of the status of the Certificate of Deposit. On March 31, 1982, Continental advised Reliance that it had unilaterally taken the Certificate of Deposit and accrued interest thereon as an offset to accounts "mistakenly" paid to Reliance by Continental under the Agreement of May 9, 1980. Notwithstanding that assertion, Reliance continues to claim that the Certificate of Deposit is being held by Continental for the benefit of Reliance and its creditors. Continental, by its actions and statements, clearly claims otherwise.

The Seventh Circuit Court of Appeals held that the claims accompanying the prayer for declaratory judgment failed to state a claim upon which relief could be granted. Those claims involve breach of contract and breach of trust. The entirety of the Seventh Circuit's decision with respect to the declaratory judgment action is as follows:

> Finally, Count VIII fails because Reliance failed to state any proper claims for relief regarding the Certificate of Deposit; a declaratory judgment is an alternative form of relief, not an independent cause of action.

Reliance asserts that the ruling of the Seventh Circuit Court of Appeals that a declaratory judgment action is not an independent cause of action is in conflict with the decisions of other Circuit Courts of Appeal and of this Court and of the explicit language of the statute itself. It should be noted that the Seventh Circuit Court of Appeals did not cite any authority for that ruling.

28 U.S.C. § 2201 states in relevant part:

> In a case of actual controversy within its jurisdiction . . . , any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, *whether or not further relief is or could be sought* . . . (Emphasis added.)

Thus, the very language of 28 U.S.C. § 2201 states that there is no need for alternative or underlying causes of action to exist in order for a party to obtain a declaratory judgment.

In *Mattis* v. *Schnarr*, 502 F.2d 588 (8th Cir. 1974) it was stated at 591:

> The plaintiff's right to declaratory relief is not dependent upon a showing that he is entitled to injunctive or monetary relief.
>
> . . . Where there is . . . a concrete case admitting of an immediate and definite determination of the legal rights of the parties in an adversary proceeding upon the facts alleged, the judicial function may be appropriately exercised although the adjudication of the rights of the litigants may not require the award of process or the payment of damages . . . [Citations omitted] *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937).

In *United States* v. *Fisher-Otis Co., Inc.*, 496 F.2d 1146 (10th Cir. 1974), it was held at 1149:

> Of course, if there are genuine issues of fact, the granting of summary judgment in a declaratory judgment suit is not in order . . . But all the United States asks for in this lawsuit is a determination of the legal relations between the parties, that is, a declaration of its rights under the flowage easement deed. A request for relief may be so limited under the Declaratory Judgment Act, and any further necessary and proper relief based upon the declaratory judgment and any additional facts which might be necessary to support such relief can be sought at a later time. (Citations omitted)

Virtually every Federal Court of Appeals which has reviewed 28 U.S.C. § 2201 has stated that it expanded the remedies available to the parties in Federal Court. *See,*

Nickerson v. *United States*, 513 F.2d 31, 33 (1st Cir. 1975); *Smith* v. *Lehman*, 689 F.2d 342, 344 (2nd Cir. 1982) *cert. den.* (1983); *Cutaiar* v. *Marshall*, 590 F.2d 523, 527 (3rd Cir. 1979); *El Paso Building & Construction Trades Council* v. *El Paso Chapter Associated General Contractors of America*, 376 F.2d 797, 799 (5th Cir. 1967) *reh. den.*; *King* v. *Sloane*, 545 F.2d 7, 8 (6th Cir. 1976); *Balistrieri* v. *United States*, 303 F.2d 617, 619 (7th Cir. 1962); *Lawrence County South Dakota* v. *State of South Dakota*, 668 F.2d 27, 29 (8th Cir. 1982); *Lear Siegler, Inc.* v. *Adkins*, 330 F.2d 595, 599 (9th Cir. 1964); *Groundhog* v. *W.W. Keeler*, 442 F.2d 674, 683 (10th Cir. 1971); *First Federal Savings and Loan Association of Lake Worth* v. *Brown*, 707 F.2d 1217, 1220)11th Cir. 1983); and *Riker Laboratories, Inc.* v. *Gist-Brocades N.V.*, 636 F.2d 772, 779 (D.C. Cir. 1980).

The Seventh Circuit Court of Appeals has effectively contradicted all of the previous decisions by attempting to limit actions under 28 U.S.C § 2201 to the category of merely being alternative forms of relief as opposed to independent causes of action.

In *Powell* v. *McCormack*, 395 U.S. 486 (1969) this Court stated at 517-518:

> . . . The Declaratory Judgment Act, 28 U.S.C. § 2201, provides that a district court may 'declare the rights . . . of any interested party . . . whether or not further relief is or could be sought.' The availability of declaratory relief depends on whether there is a live dispute between the parties . . . and a request for declaratory relief may be considered independently of whether other forms of relief are appropriate. (Citations omitted)

It would appear beyond dispute that allegations that Continental has unilaterally appropriated a Certificate of Deposit and accrued interest thereon which exceeds one million dollars while ignoring Reliance's claims to such Certificate of Deposit constitutes a "live dispute." Inasmuch

as the United States District Court had independent jurisdiction by means of 28 U.S.C. § 1332, Reliance respectfully asserts that the Seventh Circuit Court of Appeals has erred in holding that a declaratory judgment under 28 U.S.C. § 2201 is not an independent cause of action. As noted in *Woodfork* v. *Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981) at 971:

> A cause of action, in common legal parlance, is a state of facts which would entitle a person to sustain an action and to seek a judicial remedy on his behalf. (Citations omitted)

Similarly, in *Rhodes* v. *Jones*, 351 F.2d 884 (8th Cir. 1965) it was stated at 886:

> A 'cause of action' is a situation or state of facts which entitles a party to sustain an action and gives him the right to seek judicial interference in his behalf.

Inasmuch as 28 U.S.C. § 2201 specifically allows a party to obtain a declaratory judgment whether or not that party could seek other relief and inasmuch as Reliance has alleged facts in its Amended Complaint which show a live dispute between Reliance and Continental as to who is entitled to ownership of the 1.004 million dollar Certificate of Deposit and accrued interest thereon, the Seventh Circuit Court of Appeals erred in holding that Reliance's eighth claim for relief seeking declaratory judgment failed to state a claim upon which relief could be granted.

II. ALTERNATIVELY, THE ALLEGATIONS OF THE AMENDED COMPLAINT FILED BY RELIANCE STATE AN UNDERLYING CLAIM FOR BREACH OF CONTRACT OR BREACH OF TRUST SO AS TO AUTHORIZE A FEDERAL COURT TO ENTER A DECLARATORY JUDGMENT UNDER 28 U.S.C. § 2201 AS TO THE RIGHTS OF RELIANCE WITH RESPECT TO THE CERTIFICATE OF DEPOSIT.

If it is necessary for an underlying claim for relief to exist before relief in the nature of a declaratory judgment may issue, Reliance asserts that it has propounded two such claims in Counts IX and X of its Amended Complaint. Those claims for relief are respectively labeled as claims for breach of trust and breach of contract.

As noted in the Statement of the Case and the argument presented in Part I, Reliance has asserted that Continental has unilaterally appropriated a 1.004 million dollar Certificate of Deposit and interest thereon in contravention of the agreement which existed between Reliance and its creditors concerning that Certificate of Deposit. Reliance has alleged that the agreement entered into by Reliance and its creditors in December of 1979 created a trust whereby Continental is the trustee of the Certificate of Deposit and that such agreement also constituted a contract between Reliance, Continental and Reliance's creditors. The unilateral appropriation of the Certificate of Deposit is alleged to be a breach of the trust relationship or contract. Accordingly, should this Court determine that the Seventh Circuit Court of Appeals was correct in ruling an action under 28 U.S.C. § 2201 is not an independent cause of action, Reliance asserts that the Seventh Circuit of Appeals was still in error by dismissing Counts VIII through X inasmuch as Reliance has stated underlying claims for breach of contract and breach of trust which would thus allow the District Court to render a declaratory judgment.

III. THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION, AND THE SEVENTH CIRCUIT COURT OF APPEALS ERRED IN RULING THAT THE AMENDED COMPLAINT FILED BY RELIANCE STATES NO CLAIMS UPON WHICH RELIEF MAY BE GRANTED UNDER THE STANDARD OF REVIEW AS ESTABLISHED BY THIS COURT IN *SCHEUER* V. *RHODES*, 416 U.S. 232 (1974).

A. The Applicable Procedural Standard.

The standard governing dismissal of a complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure was set forth by the United States Supreme Court in *Scheuer* v. *Rhodes*, 416 U.S. 232 (1974). It was there stated at 236:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
>
> 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' *Conley* v. *Gibson*, 355 U.S. 41, 45-46, 2 L.Ed. 2d 80, 78 S.Ct. 99 (1957).

Reliance asserts that under this standard of review all of the claims asserted in the Amended Complaint should be upheld. The District Court and Seventh Circuit Court of Appeals upheld none of them and have therefore departed from previous decisions of the Seventh Circuit without justification.

B. Duress.

The first claim for relief in the Amended Complaint seeks to have the February and May, 1980 Agreements set aside on the ground that they were executed by Reliance under duress.

"Duress has been defined as a condition where one is induced by a wrongful act or threat of another to make a contract under circumstances which deprive him of the exercise of his free will, and it may be conceded that a contract executed under duress is voidable." *Laemmar* v. *J. Walter Thompson Co.*, 435 F.2d 680, 682 (7th Cir. 1970) (quoting *Kaplan* v. *Kaplan*, 25 Ill. 2d 181, 185, 182 N.E. 2d 706, 709 (1962)). In *Kaplan* the Illinois Supreme Court also stated that acts constituting duress need not be criminal, tortious or in violation of a contractual duty, but may merely be acts that are wrongful in a moral sense. *Kaplan* v. *Kaplan*, *supra*, 25 Ill. 2d at 186, 182 N.E. 2d at 709.

As set forth with more particularity in the Statement of the Case, the Amended Complaint of Reliance has alleged that specific acts of Continental were wrongful and deprived Reliance of its free will so as to now allow rescission. Such acts include: the unilateral insertion by Continental of its own name as co-holder of various Reliance bank accounts at Continental; the arbitrary failure to account for funds which might belong to Reliance and the withholding of such funds; the wrongful cancellation of commitments to purchase loans; the threat that Continental would sabotage an independent agreement between Reliance and its creditors unless Continental would receive the 1.004 million dollar Certificate of

Deposit; and threats to put Reliance out of business, inasmuch as Continental had such power, unless Reliance would sign the February and May, 1980 Agreements.

The Seventh Circuit Court of Appeals has held that less egregious threats in similar circumstances do state a claim for relief. In *Laemmar* v. *J. Walter Thompson Co.*, 435 F.2d 680 (7th Cir. 1970) the plaintiffs-employees were threatened with discharge unless they sold their corporate stock back to their employer. The plaintiffs-employees succumbed to those threats and thereafter sought to rescind the stock sales on the grounds of duress. The Seventh Circuit Court of Appeals, applying the *Kaplan* test, reversed a judgment on the pleadings entered by the District Court against the plaintiffs-employees and stated that:

> [P]laintiffs' allegations of duress by means of threatened discharge from employment are legally sufficient . . . Whether duress actually existed in this instance must be determined by the trier of fact, however, for the 'the issue of duress generally is one of fact, to be judged in light of all the circumstances surrounding a given transaction.' (citations omitted).

More recently, the Seventh Circuit Court of Appeals has acknowledged that settlement agreements could be rescinded due to duress and that the public policy for setting aside agreements which are induced by threats outweighs a policy against maintaining such settlement agreements. In *Selmer Co.* v. *Blakeslee-Midwest Co.*, 704 F.2d 924 (7th Cir. 1983), it was stated at 927:

> . . . The fundamental issue in a duress case is therefore . . . whether the statement that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a 'threat' . . .
>
> It undermines the institution of contract to allow a contract party to use the threat of breach to

> get the contract modified in his favor . . . simply because the other party, unless he knuckles under to the threat, will incur costs for which he will have no adequate legal remedy.

The Court went on to note that one factor which would be important would be whether or not the complaining party's financial duress was due to the other party's conduct. *Selmer Co.* v. *Blakeslee-Midwest Co.*, *supra*, at 928. This is precisely what is alleged by Reliance in its Amended Complaint.

C. Undue Influence.

Reliance's second claim for relief seeks to have the February and May, 1980 Agreements rescinded by virtue of undue influence on the part of Continental. This cause of action admittedly requires the existence of a fiduciary duty owing to Reliance by Continental. If such a duty is adequately alleged, Count II states a claim for relief inasmuch as transactions between fiduciaries in which the dominant party profits are presumptively invalid. *Boryca* v. *Perry*, 24 Ill. 2d 320, 181 N.E. 2d 124 (1962).

Under Illinois law a fiduciary relationship is defined as follows:

> A fiduciary relationship exists where there is special confidence reposed in one who, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing the confidence. It exists where confidence is reposed in one side and resulting superiority and influence is found on the other . . . the relationship may exist as a matter of law between attorney and client, guardian and ward, principal and agent, and the like, or it may be moral, social, domestic, or even personal. (Citations omitted.)

Kolze v. *Fordtran*, 412 Ill. 461, 468, 107 N.E. 2d 686, 690 (1952).

" . . . Illinois courts have refused to set definite and precise boundaries within which a fiduciary relationship may be found to arise." *DeValk Lincoln Mercury, Inc.* v. *Ford Motor Co.*, 550 F. Supp. 1199, 1203 (N.D. Ill. 1982) (citations omitted). Futhermore, Illinois courts have stated that a fiduciary relationship may exist where a bank has domination and influence over its customer. *See, Paskas* v. *Illini Federal Savings & Loan Association*, 109 Ill. App. 3d 24, 440 N.E. 2d 194, 199 (5th Dist. 1982). Reliance has alleged that it opened and funded accounts at Continental, thus evidencing confidence placed by Reliance in Continental. As reflected in the Statement of the Case, the Amended Complaint is replete with allegations showing superiority and influence by Continental over Reliance. Reliance has therefore stated a claim for relief to rescind the February and May, 1980 Agreements based upon undue influence by Continental.

D. Unconscionable Contract.

The third claim for relief seeks to set aside the February and May, 1980 Agreements on the ground that they are unconscionable. The test of unconscionability is "overreaching of a contracting party who is in an unfairly superior bargaining position." *American Food Management, Inc.* v. *Henson*, 105 Ill. App. 3d 141, 146, 434 N.E. 2d 59, 63 (5th Dist. 1982). Unconscionability was defined in *Williams* v. *Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965) as follows:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.

The only choice which Reliance had when presented with the threats of Continental was to be placed into bankruptcy or to agree to accept a sum which was less than one-tenth of what would otherwise have been due to Reliance. In order to obtain even that minimal amount of funds, Continental required Reliance to execute releases. Thus, Reliance falls

squarely within the class of persons intended to be protected by the doctrine of unconscionability.

E. Breach of Fiduciary Duty.

Reliance has already set forth its argument in Part C concerning the existence of a fiduciary duty owed by Continental to Reliance and the acts which have breached that duty. If any of the first three claims for relief seeking rescission of the February and May, 1980 Agreements are found to state a claim for relief, then this claim and the claims discussed in Parts F, G and H should also be reinstated.

F. Breach of Contract.

The fifth claim for relief alleges breach of contract. Specifically, the Amended Complaint alleges the existence of numerous agreements and resulting breaches by Continental which injured Reliance. Included in such allegations are: wrongful cancellation of loan commitments by Continental, Continental's wrongful requirement that Reliance repurchase a loan which had been purchased by Continental; and Continental's failure to pay Reliance the profits which it was entitled to on mortgages sold by Reliance to Continental.

G. Accounting.

The sixth claim for relief seeks an accounting for funds due and owing to Reliance from Continental as a result of their business relationship. In *Metro-Goldwyn-Mayer, Inc.* v. *Antioch Theatre Co.*, 52 Ill. App. 3d 122, 132, 367 N.E.2d. 247, 255 (1st Dist. 1977) it was stated:

> A court will exercise jurisdiction for the purpose of ordering an accounting when discovery is necessary; when complicated or mutual accounts are involved; or when a fiduciary relationship exists between the parties.

Reliance has alleged in its Amended Complaint that over 3,000 separate loans were sold by Reliance to Continental and that discovery under the Federal Rules of Civil Procedure would be inefficient in attempting to determine exactly what

profits have been lost by Reliance. Reliance also alleged that the documentation concerning such loans and profits would be complex and voluminous. Accordingly, Reliance has stated a claim for relief under Illinois law for an accounting.

H. Tying Arrangement Under 12 U.S.C. §1972

12 U.S.C. §1972 provides in pertinent part:

> (1) A bank shall not in any manner extend credit, lease or sell property of any kind, or furnish any service, or fix or vary the consideration for any of the foregoing on the condition or requirement —
>
> (A) that the customer shall obtain some additional credit, property, or service from such bank other than a loan, discount, deposit, or trust service;
>
> (B) . . . ;
>
> (C) that the customer provide some additional credit, property, or service to such bank, other than those related to and usually provided in connection with a loan, discount, deposit, or trust service;
>
> (D) . . . ; or
>
> (E) that the customer shall not obtain some other credit, property, or service from a competitor of such bank . . .

The Amended Complaint alleges the following actions taken by Continental which would violate 12 U.S.C. §1972. First, that Continental wrongfully required Reliance to place the 1.004 million dollar Certificate of Deposit with Continental in December of 1979 after the business relationship had been established between Reliance and Continental. Second, that Continental refused to pay Reliance the profits to which it was entitled and thereby placed Reliance in a position where it was unable to obtain other credit, property or service from a competitor of Continental. Third, that Continental wrongfully cancelled loan commitments which had been made in writing to Reliance and thereby forced Reliance to obtain additional coverage from Continental at a greater cost.

Fourth, that Continental wrongfully and unilaterally exercised total dominion and control over Reliance's accounts at Continental as a condition to provide any other service and as a means of preventing Reliance from obtaining any funding service of other competitors. Finally, Reliance has alleged in its Amended Complaint that the foregoing actions of Continental are unusual and extraordinary and are neither related to nor usually provided for within the banking industry in connection with the type of business relationship which existed between Reliance and Continental. Thus, Reliance asserts that the Seventh Claim for Relief states a claim upon which relief may be granted.

I. Declaratory Judgment, Breach of Contract and Breach of Trust

These issues are addressed in Parts I and II herein and Reliance will not repeat those arguments.

CONCLUSION

For the foregoing reasons, the Petitioners pray that a Petition for a Writ of Certiorari be granted.

Dated: April 20, 1984.

Respectfully submitted,

SILVER AND KELLEY,
A Professional Corporation

By: /s/ JACK SILVER

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APPENDIX

United States District Court

NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION
CIVIL ACTION NO. 82 C 2186

RELIANCE MORTGAGE CORPORATION,
A COLORADO CORPORATION,
Plaintiff,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
AN ILLINOIS CORPORATION
Defendant.

VERIFIED AMENDED COMPLAINT

COMES NOW the Plaintiff, RELIANCE MORTGAGE CORPORATION, a Colorado corporation, by and through its attorneys, SILVER and KELLEY, a Professional Corporation, and FABER & CUNNIFF, LTD., and for its Amended Complaint against the Defendant, CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, an Illinois corporation, states as follows:

PARTIES

1. The Plaintiff, Reliance Mortgage Corporation (hereinafter referred to as "Reliance"), is and at all times relevant hereto was a corporation created under and existing pursuant to the laws of the State of Colorado with its principal place of business at 5990 South Syracuse, Englewood, Colorado.

2. The Defendant, Continental Illinois National Bank and Trust Company of Chicago (hereinafter referred to as "Continental"), is, upon information and belief, an Illinois corporation with its principal place of business at 231 South LaSalle Street, Chicago, Illinois.

JURISDICTION

3. This Court has jurisdiction over this controversy inasmuch as Reliance has sustained damages in excess of $10,000.00, exclusive of interest and costs, and there is diversity of citizenship pursuant to 28 U.S.C. §1332. Furthermore, there is a Federal question presented in this controversy pursuant to 12 U.S.C. §1972 and jurisdiction is therefore proper pursuant to 28 U.S.C. §1331.

FACTUAL ALLEGATIONS

4. Reliance is and has been in the mortgage banking business for approximately ten years. Throughout that period of time Eugene J. Cahill was president and the majority shareholder of Reliance.

5. In early May of 1979 a series of circumstances caused the banks and securities dealers with whom Reliance had accounts to feel insecure concerning Reliance's positions in the Government National Mortgage Association (GNMA) securities market and such banks and securities dealers accelerated Reliance's indebtedness to them.

6. As of May 15, 1979, Continental was the only bank which would agree to purchase loans from Reliance.

7. Representatives of Continental advised representatives of Reliance that Continental wished to extend credit to Reliance and purchase loans from Reliance together with the servicing of such loans so as to enlarge the servicing portfolio which Continental had.

8. Representatives of Continental further advised representatives of Reliance that Reliance could and should deposit any and all profits that were made on the sale of mortgages from Reliance to Continental in an account at Continental so that other banks and securities dealers would not be able to offset Reliance's accounts against Reliance's debts.

9. On May 17, 1979, Reliance and Continental entered into a purchase agreement which formed the basis for the extension of credit to Reliance and purchase of loans from Reliance by Continental. A copy of such agreement is attached hereto and incorporated herein as Exhibit A.

10. After the execution of the May 17, 1979 agreement (Exhibit A) Reliance opened two bank accounts at Continental: the first account was a loan closing clearing account from which Continental would wire funds to various title companies so that Reliance could cover the cost of closing each and every loan which was originated by Reliance; the second account was called the Cash Collateral Account and was to contain the profits that Reliance realized on the sale of mortgages to Continental that had been originated by Reliance.

11. Commencing May 17, 1979, Continental unilaterally and without authorization or consent from Reliance inserted its own name as co-holder of the Cash Collateral Account so that Reliance could not withdraw funds from that account without Continental's permission.

12. Commencing May 17, 1979, Continental unilaterally and without the authorization or consent of Reliance refused to put profits which Reliance may have realized into the Cash Collateral Account. Rather, Continental required Reliance to submit a list of its overhead obligations and Continental would in its own unilateral discretion wire such money as it deemed fit to Reliance's bank in Englewood, Colorado so as to allow Reliance to continue its business operations.

13. In October of 1979 Continental advised Reliance that, notwithstanding previous agreements in writing, Continental was going to cancel certain commitments it had made to Reliance concerning coverage for loans to be purchased. The coverage which was cancelled was as follows:

(a) $7,600,000.00 of VA/FHA loan commitments;

(b) $2,000,000.00 of FHA-245 loan commitments;

(c) $10,000,000.00 in loan commitments to Reliance that Continental told Reliance it had filled with a Continental GNMA Certificate; and

(d) $5,000,000.00 in FHA/VA commitments which Continental had traded away.

14. Due to the cancellation of the commitments set forth in Paragraph 13 above, Reliance had to purchase additional loan commitments through Continental resulting in a windfall profit to Continental in the amount of approximately $2,492,000.00 which would otherwise have been the profit of Reliance.

15. On or about November 13, 1979, Continental again cancelled an additional $8,626,870.00 in FHA-245 coverage despite having previously confirmed in writing their commitment to purchase such loans.

16. The cancellation of the additional commitments set forth in Paragraph 15 again cost Reliance substantial profits.

17. Between May and December of 1979 Continental wrongfully required Reliance to repurchase a loan in foreclosure which Continental had purchased under the May 17, 1979 agreement (Exhibit A) at a cost to Reliance of $60,000.00.

18. Upon information and belief, the profits which Reliance earned from origination fees and from sales of loans to Continental during the period May, 1979 to November, 1979 were in excess of $5,000,000.00 although Continental refused to allow Reliance to have access to such funds and refused to account for such profits.

19. Between September of 1979 and early January, 1980 a dispute arose between Reliance and Continental as to which party was entitled to profits generated on the sale of GNMA pools when interest rates changed. Specifically, Reliance and Continental disagreed on whether Continental was purchasing loans from Reliance under a yield-maintenance commitment or a fixed price commitment.

20. Notwithstanding the fact that the yield-maintenance commitment is the common manner of doing business in the industry and no agreement to the contrary existed, Continental unilaterally refused to acknowledge the fact that its purchases of loans from Reliance were on a yield-maintenance commitment basis and refused to give profits to Reliance arising from such an arrangement, said profits totaling at least $4,000,000.00.

21. In December of 1979 Reliance entered into an agreement with the securities dealers and banks who were its creditors whereby Reliance would repay its indebtedness to those securities dealers and banks. Part of such agreement was that approximately $1,000,000.00 would be placed on deposit and that the creditors would have a security interest in such deposit.

22. Continental threatened to sabotage the repayment agreement between Reliance and its creditors and further threatened to withdraw all of its loan commitments previously made to Reliance unless the money to be placed on deposit was placed in a certificate of deposit at Continental.

23. If Reliance could satisfy its indebtedness to its creditors or if other satisfactory arrangements could be made, Reliance would be entitled to the return of the $1,004,000.00 certificate of deposit plus accrued interest.

24. If satisfactory arrangements for the repayment of the indebtedness were not made by Reliance, the $1,004,000.00 certificate of deposit held by Continental was to become the property of the securities dealers and banks who were creditors of Reliance.

25. In December of 1979 Continental again unilaterally rescinded a written agreement whereby it had promised to purchase $200,000,000.00 in mortgages originated by Reliance for the calendar year 1980. Instead, Continental advised Reliance it would purchase only $12,000,000.00 a month and indeed only purchased a total of $20,000,000.00 for the entire calendar year of 1980.

26. The cancellation of commitments as set forth in Paragraph 25 cost Reliance approximately $9,500,000.00 in lost profits for the calendar year 1980 inasmuch as Reliance could have closed loans in the amount of $200,000,000.00 had Continental abided by its agreement.

27. But for the wrongful acts of Continental insofar as improperly withholding the profits of Reliance and cancelling commitments upon which Reliance had relied, Reliance would have been a viable business entity able to conduct business on its own without having to do business with Continental in January of 1980.

28. From the period May, 1979 through January, 1980, Reliance consistently demanded an accounting of its profits from Continental and consistently demanded the tender of such profits from Continental. Throughout this period of time Continental refused to account for the profits of Reliance or allow Reliance unlimited access to its own funds.

29. Rather than tender the profits due to Reliance, Continental unilaterally and wrongfully advised Reliance to cease complaining about profits not received or else Continental would utilize its economic strength over Reliance to put Reliance out of business by paying Reliance none of its earned profits and by rescinding all of its previous commitments to purchase loans which Reliance was relying upon.

30. By January of 1980 the foregoing wrongful activities of Continental had placed Reliance in a position whereby unless it received at least a small proportion of the profits to which it was entitled it would be forced out of business.

31. Continental utilized its dominant position over Reliance by unilaterally claiming all profits arising from the yield-maintenance agreement which had been in effect and requiring Reliance to enter into an agreement on February 1, 1980 conceding such profits. A copy of such agreement is attached hereto and incorporated herein by this reference as Exhibit B.

32. Pursuant to the agreement of February 1, 1980 (Exhibit B) both Reliance and Continental were to perform accountings of their respective books and records to determine what further funds were owed to which party, such accounting to be accomplished by February 6, 1980.

33. Reliance performed the accounting required by the February 1, 1980 agreement in a timely fashion.

34. Continental did not perform the accounting required by the February 1, 1980 agreement and refused all demands by Reliance after February 6, 1980 for an accounting.

35. After February 1, 1980 the business dominance of Continental over Reliance continued inasmuch as Continental continued to withhold profits previously earned by Reliance, continued to refuse to tender an accounting as required by the February 1, 1980 agreement and refused to take any steps to mitigate the damages suffered by Reliance when Continental wrongfully cancelled commitments to purchase loans.

36. After February 1, 1980 Reliance contacted other banks and financial institutions for the purpose of attempting to break away from the exclusive business arrangement which Reliance had with Continental.

37. During Reliance's negotiations with such third parties Reliance would advise such third parties that it was currently doing business with Continental.

38. When the third parties contacted representatives of Continental to confirm the business relationship which Reliance had with Continental, Continental wrongfully and deliberately thwarted Reliance's efforts to find a new source of credit and purchaser of loans by advising such third parties that Continental did minimal business with Reliance, Reliance's business with Continental was marginally profitable if at all, and Reliance had no accounts containing any significant funds at Continental.

39. But for the wrongful acts of Continental as set forth in Paragraphs 35 and 38 above, Reliance would have been a viable business entity able to conduct business on its own without having to do business with Continental during the period February 1, 1980 through May of 1980.

40. On May 8, 1980, Reliance and Continental executed an agreement whereby Reliance received a total of $847,000.00 in what purported to be a full and complete settlement of all claims which it had against Continental. A copy of said agreement is attached hereto and incorporated herein as Exhibit C.

41. By the terms of that same agreement (Exhibit C), Continental gave up any and all claims which it might have had to the $1,004,000.00 certificate of deposit which it possessed.

42. The execution of the agreements dated February 1, 1980 (Exhibit B) and May 9, 1980 (Exhibit C) was performed by Reliance only due to the fact that Continental had breached numerous agreements with Reliance and thereby improperly obtained the economic power over Reliance so as to be able to drive it out of business. Furthermore, Continental wrongfully threatened to drive Reliance out of business if the agreements were not signed.

43. Throughout the period May, 1979 to May, 1980, Continental had purchased approximately 3000 loans from Reliance.

44. On or about February 27, 1981, Continental confirmed to an independent certified public accountant that the $1,004,000.00 certificate of deposit was being held for Reliance's benefit as well as accrued interest in the amount of $120,000.00

45. During the Fall of 1981 Continental, without notice or explanation, ceased to confirm the existence of the $1,004,000.00 certificate of deposit plus as the accrued interest thereon.

46. Representatives of Reliance repeatedly contacted Continental from the Fall of 1931 through March 31, 1982 demanding an explanation for the failure of Continental to acknowledge the $1,004,000.00 certificate of deposit plus accrued interest thereon.

47. On or about March 31, 1982, Continental, by and through its officers and agents, John Davey, Vice-President, and Raymond T. Daly, Manager, advised Reliance that Continental had taken the $1,004,000.00 certificate of deposit, plus accrued interest, as an offset to accounts "mistakenly" paid to Reliance under the agreement dated May 9, 1980 (Exhibit C).

48. Reliance continues to assert that the $1,004,000.00 certificate of deposit plus accrued interest thereon is the property of Reliance being held by Continental for the benefit of Reliance and certain creditors of Reliance notwithstanding the assertions of Continental's representatives.

FIRST CLAIM FOR RELIEF
(Duress)

49. Reliance incorporates Paragraphs 1 through 48 of its Complaint as if set forth with complete particularity.

50. Prior to and at the time of executing the agreements dated February 1, 1980 (Exhibit B) and May 9, 1980 (Exhibit C) the free agency of Eugene J. Cahill as president of Reliance had been overcome by the following acts of Continental:

(a) The unauthorized establishment of a joint bank account known as the Cash Collateral Account from which Reliance was not permitted to withdraw any of its profits or its funds without the permission of Continental;

(b) The failure of Continental to obtain Reliance's approval in establishing the joint account referred to in Paragraph 50(a) above;

'c) The wrongful withholding by Continental of funds belonging to Reliance that had been earned by Reliance in the sale of mortgages to Continental from March 17, 1979 to December 31, 1979;

(d) The intentional withholding of profits belonging to Reliance until and unless Reliance signed the February 1, 1980 agreement which required Reliance to give up substantial profits earned due to changes in interest rates;

(e) The wrongful cancellation of commitments totalling over $40,000,000.00 in coverage that Continental had agreed to purchase from Reliance;

(f) Threats by Continental to cut off or severely curtail the purchase of loans originated by Reliance despite the fact that Continental had previously agreed to purchase such loans and further despite the fact that Continental knew it was the only source of funds for Reliance and that a termination of such funding would put Reliance into bankruptcy;

(g) The withholding of profits and funding for commitments which consistently kept Reliance in suspense as to whether it was solvent at any given time;

(h) The failure to abide by the terms and conditions of the February 1, 1980 agreement;

(i) The intentional withholding of any profits from Reliance until Reliance signed and agreed to the terms and conditions of the May 9, 1980 agreement.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that the February 1, 1980 agreement and the May 9, 1980 agreement be rescinded and declared null and void, for its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

SECOND CLAIM FOR RELIEF
(Undue Influence)

51. Reliance incorporates Paragraphs 1 through 50 of its Complaint as if set forth with complete particularity.

52. Continental owed a fiduciary duty to Reliance due to the following:

(a) Continental knew it was Reliance's sole source of funds after May 15, 1979;

(b) Continental assumed control, without the authority or consent of Reliance, of all of Reliance's profits that were realized on the sale of mortgages to Continental by Reliance;

(c) Continental controlled the funds which Reliance had access to and therefore controlled the operation of Reliance in its business;

(d) Continental had maneuvered itself into a position whereby it was able to control not only the business of Reliance, but the ability of Reliance to obtain funding from other sources.

(e) While owing a fiduciary duty to Reliance, Continental induced Reliance to enter into the February 1, 1980 agreement and the May 9, 1980 agreement by means of unfair persuasion as set forth in Paragraph 50 (a) through (i) above.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that the February 1, 1980 agreement and the May 9, 1980 agreement be rescinded and declared null and void, for its costs as incurred herein, for an award of reasonable attorney's fees and such other and further relief as this Court may deem proper.

THIRD CLAIM FOR RELIEF
(Unconscionable Contract)

53. Reliance incorporates Paragraphs 1 through 52 of its Complaint as if set forth with complete particularity.

54. Due to the actions of Continental as set forth in Paragraphs 50 (a) through (i) and 52 (a) through (e) above, Reliance entered into the February 1, 1980 agreement and May 9, 1980 agreement.

55. The February 1, 1980 agreement (Exhibit B) and the May 9, 1980 agreement (Exhibit C) are so unfair and inequitable as to shock the conscience of a reasonable person and are therefore unconscionable.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that the February 1, 1980 agreement and the May 9, 1980 agreement be rescinded and declared null and void, for an award of its costs as incurred herein, reasonable attorney's fees and such other and further relief as this Court may deem proper.

FOURTH CLAIM FOR RELIEF
(Breach of Fiduciary Duty)

56. Reliance incorporates Paragraphs 1 through 55 of its Complaint as if set forth with complete particularity.

57. Continental owned a fiduciary duty to Reliance and breached that fiduciary duty by failing to act in good faith with Reliance and by taking advantage of Reliance's financial condition by exercising undue influence and duress to gain financial advantage over Reliance and to unlawfully derive corporate profit for itself at Reliance's expense.

58. Such fiduciary duty arose from the acts set forth in Paragraph 52(a) through (e) above.

59. The breaches of such fiduciary duty are as specified in Paragraph 50(a) through (i) above.

60. Reliance has suffered the following damages due to Continental's breach of fiduciary duty:

(a) The loss of not less than $2,000,000.00 in profits arising from the wrongful cancellation of over $20,000,000.00 in loan commitments in October of 1979.

(b) The loss of not less than $1,000,000.00 in profits due to the wrongful cancellation of commitments in the amount of $8,626,000.00 by Continental on November 13, 1979;

(c) The wrongful requirement that Reliance repurchase a loan in foreclosure at a cost of $60,000.00 between May and December of 1979;

(d) The loss of not less than $9,500,000.00 in profits due to the wrongful reduction by Continental of loan commitments from $200,000,000.00 to approximately $20,000,000.00 for the calendar year 1980;

(e) The loss of at least $5,245,300.63 arising from the failure of Continental to pay Reliance profits on mortgages sold by Reliance to Continental;

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court enter judgment in its favor upon its Fourth Claim For Relief against the Defendant in an amount not less than $17,805,300.63 plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

FIFTH CLAIM FOR RELIEF
(Breach of Contract)

61. Reliance incorporates Paragraphs 1 through 60 of its Complaint as if set forth with complete particularity.

62. Continental breached various contracts which it had with Reliance, such breaches being more particularly set forth in Paragraph 60 above.

63. As a direct result of such breaches of contract by Continental, Reliance has incurred damages in an amount not less than $17,805,300.63 as set forth in Paragraph 60 above.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court enter judgment in its favor upon its Fifth Claim for Relief against the Defendant in an amount not less than $17,805,300.63 plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

SIXTH CLAIM FOR RELIEF

(Accounting)

64. Reliance incorporates Paragraphs 1 through 63 of its Complaint as if set forth with complete particularity.

65. The existence of over 3,000 separate loans sold by Reliance to Continental renders discovery under the Federal Rules of Civil Procedure inefficient in attempting to determine exactly what profits Reliance lost due to the wrongful actions of Continental.

66. The documentation concerning such loans and the profits to be derived therefrom by Reliance is complex and voluminous.

67. The actions of Continental in refusing to pay such profits to Reliance were tainted by the duress and undue influence of Continental, Continental's breaches of contracts and fiduciary duties and the unconscionability of the February 1, 1980 and May 9, 1980 agreements.

68. Reliance is entitled to an accounting of the loan transactions which occurred between it and Continental so as to accurately determine the profits to which it is entitled.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court order an accounting from the Defendant regarding the profits unjustly

withheld from Reliance on the loan transactions between Reliance and Continental, plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

SEVENTH CLAIM FOR RELIEF
(Tying Arrangement — 12 U.S.C. §1972)

69. Reliance incorporates Paragraphs 1 through 68 of its Complaint as if set forth with complete particularity.

70. Continental is, upon information and belief, a "bank" as that term is defined in 12 U.S.C. §1841 and 12 U.S.C. §1971.

71. Continental violated the provisions of 12 U.S.C. §1972 inasmuch as Continental extended credit to Reliance and furnished services to Reliance with the requirement that Reliance had to obtain additional credit, property or service from Continental other than a loan, discount, deposit or a trust service.

72. Continental further violated the provisions of 12 U.S.C. §1972 by requiring that Reliance had to provide some additional credit, property or service to Continental or its subsidiary other than those normally related to and provided for in connection with a loan, discount, deposit or trust service.

73. The specific actions of Continental in violating 12 U.S.C. §1972 were as follows:

(a) Requiring Reliance to establish an account at Continental to hold Reliance's profits from the sale of mortgages to Continental and then requiring Reliance to assent to Continental's approval of any disbursements from that account;

(b) Requiring Reliance to deposit at least $1,000,000.00 in a certificate of deposit at Continental

without which Continental would have cancelled its loan commitments to Reliance;

(c) Continental refused to pay Reliance the profits to which it was entitled and thereby placed Reliance in a position whereby it could not obtain any other credit, property or service from a competitor of Continental;

(d) Continental cancelled commitments which had been made in writing to Reliance and which Reliance had relied upon, thereby forcing Reliance to obtain additional coverage from Continental at a greater cost;

(e) Continental required Reliance to establish an account at Continental to hold Reliance's profits from the sale of mortgages to Continental and Continental thereafter exercised total dominion and control over such account as a condition to provide any other service;

(f) Continental required Reliance to establish an account at Continental to hold Reliance's profits from the sale of mortgages to Continental and Continental then exercised total dominion and control over such account with the intention of and as a means of preventing Reliance from obtaining the banking services of any competitors.

74. The foregoing conditions imposed by Continental on Reliance are unusual and extraordinary acts not related to nor usually provided within the banking industry in connection with the type of business relationship which existed between Reliance and Continental.

75. As a direct result of the actions of Continental in violation of 12 U.S.C. §1972, Reliance has been damaged in the amount of $5,245,300.63.

76. Pursuant to 12 U.S.C. §1975 Reliance is entitled to treble the amount of damages it has sustained together with the costs it has incurred in this suit and reasonable attorney's fees.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court enter judgment in its favor upon its Seventh Claim for Relief in the amount of $5,245,300.63 against the Defendant and further requests that this Court treble that amount to the sum of $15,735,901.89, plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

EIGHTH CLAIM FOR RELIEF
(Declaratory Judgment)

77. Reliance incorporates Paragraphs 1 through 76 of its Complaint as if set forth with complete particularity.

78. A dispute has arisen between Reliance and Continental as to the location of and rights to the $1,004,000.00 certificate of deposit plus accrued interest thereon.

79. Reliance is an interested party as that term is defined in 28 U.S.C. §2201 with regard to the $1,004,000.00 certificate of deposit plus accrued interest thereon.

80. Pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §2201, Reliance requests this Court issue a declaratory judgment setting forth the rights and other legal relations of Reliance with regard to the $1,004,000.00 certificate of deposit plus accrued interest thereon.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court enter a declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure and 28 U.S.C. §2201 setting forth the rights and other legal relations of Reliance with regard to the $1,004,000.00 certificate of deposit plus accrued interest thereon, plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

NINTH CLAIM FOR RELIEF
(Breach of Trust)

81. Reliance incorporates Paragraphs 1 through 80 of its Complaint as if set forth with complete particularity.

82. The agreement entered into by Reliance and its creditors in December of 1979 created a trust or resulting trust whereby Continental is the trustee of the $1,004,000.00 certificate of deposit placed with it plus the accrued interest thereon.

83. Representatives of Continental now claim that they are entitled to the $1,004,000.00 certificate of deposit plus accrued interest thereon.

84. The $1,004,000.00 certificate of deposit plus accrued interest thereon are the property of Reliance and not Continental.

85. The attempt to claim such $1,004,000.00 certificate of deposit plus accrued interest thereon by Continental constitutes a breach of its duty as trustee in favor of Reliance and Reliance's creditors.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court enter judgment in its favor upon its Ninth Claim for Relief against the Defendant in the amount of $1,004,000.00, plus accrued interest thereon, plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

TENTH CLAIM FOR RELIEF
(Breach of Contract)

86. Reliance incorporates Paragraphs 1 through 85 of its Complaint as if set forth with complete particularity.

87. The agreement in December of 1979 whereby Continental came into possession of the $1,004,000.00 certificate

of deposit constituted a contract between Reliance, Continental and Reliance's creditors.

88. The contract between Reliance, Continental and Reliance's creditors included, as does every contract, an obligation to perform the same in good faith.

89. The attempts by Continental to claim it is entitled to the $1,004,000.00 certificate of deposit and accrued interest thereon constitutes a breach of the implied covenant of good faith in the contract between Reliance, Continental and Reliance's creditors.

90. Reliance has been damaged by such breach of contract by Continental in the amount of $1,004,000.00 plus accrued interest thereon.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court enter judgment in its favor upon its Tenth Claim for Relief against the Defendant in the amount of $1,004,000.00, plus accrued interest thereon, plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

ELEVENTH CLAIM FOR RELIEF
(Exemplary Damages)

91. Reliance incorporates Paragraphs 1 through 90 of its Complaint as if set forth with complete particularity.

92. The actions taken by Continental and its representatives as more fully set forth in Paragraphs 45 through 47 above and 50(a) through (i) above were performed with a wanton and willful disregard for the rights of Reliance and were attended by circumstances of malice and insult.

93. Due to the foregoing, Reliance is entitled to an award of exemplary damages in the amount of $100,000,000.00.

WHEREFORE, the Plaintiff, Reliance Mortgage Corporation, a Colorado corporation, prays that this Court enter judgment in its favor upon its Eleventh Claim for Relief against the Defendant in the amount of $100,000,000.00, plus its costs as incurred herein, reasonable attorney's fees, and such other and further relief as this Court may deem proper.

JURY DEMAND

Plaintiff hereby demands a jury trial on all issues so triable.

Respectfully submitted,

SILVER AND KELLEY
A Professional Corporation

By Robert W. Smith

Jack Silver
Robert W. Smith
Michael F. Feeley
Ninth Floor
Western Federal Savings
Building
210 University Boulevard
Denver, Colorado 80206
Telephone: (303) 321-5700

FABER AND CUNNIFF,
LTD.

By _____

Kenneth L. Cunniff
Bannister Hall
29 So. LaSalle Street
Suite 900
Chicago, Illinois 60603
Telephone: (312) 782-5140

Address of Plaintiff:

5990 South Syracuse
Englewood, Colorado

VERIFICATION

I, Eugene J. Cahill, hereby acknowledge that I am chief executive officer of Reliance Mortgage Corporation, the Plaintiff in this matter, and that I have read the foregoing Verified Amended Complaint and the contents thereof are true and correct to the best of my information, knowledge and belief.

Eugene J. Cahill
President, Reliance Mortgage Corporation

STATE OF COLORADO)
) ss:
CITY AND COUNTY OF DENVER)

Subscribed, sworn to and acknowledged before me this 2nd day of December, 1982, by Eugene J. Cahill.

WITNESS my hand and official seal.

Notary Public

5990 S. Syracuse St.
Address

Englewood, CO 8111

My Commission Expires
September 21, 1985

CERTIFICATE OF MAILING

I hereby certify that I have mailed on this day of , 1982, a true and correct copy of the above and foregoing Verified Amended Complaint by placing the same in the United States Mails, postage prepaid, addressed to:

Richard F. Levy
LEVY AND ERENS
208 South LaSalle Street
Suite 1100
Chicago, Illinois 60604

PURCHASE AGREEMENT

This is an Agreement dated this 17th day of May, 1979 by and between RELIANCE MORTGAGE CORPORATION, a Colorado Corporation (the "Owner") and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO (the "Purchaser").

1. Owner hereby agrees to sell and deliver to Purchaser, and Purchaser agrees to buy and accept from Owner, those FHA-insured and VA-guaranteed single-family residential mortgage loans listed by name of borrower and other identifying information on Exhibit A attached hereto, together with all notes, mortgages, title insurance, FHA and VA commitments, private mortgage insurance commitments, RESPA and truth-in-lending statements, casualty insurance commitments, surveys, and other agreements and rights relating to such loans (herein, such loans and other rights are collectively called the "Loans").

The purchase price for the Loans shall be $6,174,379.60. On the date hereof, the Purchaser has paid the Owner $1,642,584.00 to apply on the purchase price. To the extent that the Owner establishes to the satisfaction of the Purchaser that the Owner has disbursed in cash or has otherwise finally paid the proceeds of the Loans to the borrowers obligated thereon, then the Purchaser shall pay to Owner such amount, as a credit to the purchase price, as the Owner has finally paid. The balance of the purchase price shall be paid by Purchaser to Owner after the Purchaser is satisfied, in its judgment, that the proceeds of the Loans have been finally paid to or on behalf of the borrowers obligated thereon.

The Owner hereby represents and warrants to the Purchaser that it has full ownership in and to the Loans and that no other person or entity of any kind has any right, claim, security interest, or encumbrance of any kind in any Loans. Each and all of the Loans complies fully and in all respects with the requirements of the Government National Mortgage Association for one-to-four family residential mortgage loans

which are eligible for inclusion in pools of such mortgage loans and with respect to which GNMA will issue mortgage-backed pass-through certificates. Without limitation on the generality of the foregoing, the Owner represents, warrants and covenants to and with the Purchaser that: (a) each signatory on the notes evidencing the Loans is a natural person who had full capacity to execute and deliver the notes, mortgages and other documents and agreements relating to the Loans, (b) each of the mortgages relating to the Loans has been delivered to the appropriate public filing officer for the jurisdiction in which the real estate encumbered by the mortgage is located, and the Owner will promptly execute and deliver to the Purchaser recordable assignments of such mortgages, (c) the Owner shall promptly execute and deliver to the Purchaser good and valid assignments of all FHA-insurance and VA-guarantee commitments related to the Loans so that each certificate of insurance or guarantee related to the Loans will be issued through the Purchaser as the owner of the Loan to which certificate relates, (d) the Owner will cause the ALTA mortgage title insurance policies relating to the Loans to be issued showing the Owner or its assigns as the insured mortgagee thereunder, and if required by GNMA or a GNMA custodian prior to its acceptance of any loans for a GNMA pool, also showing Purchaser as the insured mortgagee, and (e) the Owner will deliver to the Purchaser all papers, documents, and other writings of any kind owned by the Owner with respect to the Loans.

Contemporaneously herewith, the Owner and Purchaser have agreed that the Owner will sell to the Purchaser and the Purchaser will buy from the Owner all one-to-four family residential mortgage loans originated or produced by the Owner's business operations during the ninety-day period following the date of this Agreement at a price which is one point over the bid price on the cash market for Government National Mortgage Association guaranteed pass-through certificates which would be issuable with respect to the mortgage loans being sold by Owner to Purchaser and which bear an interest rate of one-half percent per annum less than the

stated interest rate appearing on the mortgage notes evidencing the particular mortgage loans being sold; provided, however, that the aggregate purchase and sale commitment under such agreement shall relate to a minimum of $100,000,000 of such mortgage loans at par. The parties agree promptly to negotiate and execute an agreement for such purchase and sale, including without limitation (a) protection for the Purchaser with respect to the quality of the loans subject to the agreement, (b) payment for the purchase price only after the loan proceeds have been advanced in cash or 80% to 95% paid, (c) delivery to the Purchaser of all notes, insurance commitments and other writings and documents, all showing the Purchaser as the owner, obligee, beneficiary or creditor prior to the payment of any portion of the purchase price of the loans, and (d) full compliance with the loans purchased to the standards required for mortgage loans in GNMA pools.

IN WITNESS WHEREOF, the parties have executed and delivered this Agreement the day and year first above written.

RELIANCE MORTGAGE CORPORATION

By _____
President

Attest:

_____
Secretary

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

By _____
Vice President

SETTLEMENT AGREEMENT AND RELEASE

This Agreement made and entered into the 1st day of February 1980 by and between RELIANCE MORTGAGE CORPORATION, a Colorado corporation, 14 Inverness Drive East, Englewood, Colorado 80112 ("Reliance"), and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, 231 South LaSalle Street, Chicago, Illinois 60693 ("Continental");

WITNESSETH

WHEREAS, commencing May 17, 1979 and continuing through January 25, 1980, Reliance sold to Continental and Continental purchased from Reliance single family residential mortgage loans originated by Reliance, and the parties now wish to terminate any obligations, relationships or arrangements between them except for those contained in this Agreement.

NOW, THEREFORE, for and in consideration of the mutual agreements herein contained and for other good and valuable consideration the receipt and sufficiency of which is hereby irrevocably acknowledged, the parties agree as follows:

1. *February Purchase and Sale.* Continental hereby agrees to purchase from Reliance, at such times during February, 1980, and in such amounts, as Reliance may from time to time request, VA-Guaranteed or FHA-Insured (pursuant to Section 203) single family residential mortgage loans originated by Reliance (the "Mortgage Loans") having an aggregate face principal amount not in excess of $6,000,000 upon the following terms and conditions:

(a) All Mortgage Loans shall be originated by Reliance (or any affiliate whose mortgages have been sold to Continental) in the ordinary course of its business, in accordance with first class industry standards and at the maximum legal interest rate available to Reliance on the date of funding;

(b) The purchase price for each Mortgage Loan shall be 97.5% of par (i.e. 97.5% of the face amount of the Note);

(c) The purchase price for each Mortgage Loan shall be payable as follows: an amount (not in excess of the purchase price therefor) equal to the net amount payable by Reliance as its out-of-pocket disbursements to third parties in connection with the origination and disbursement of such Loan shall be paid by wire transfer to an escrowee title company satisfactory to Reliance and Continental for disbursement to, or at the direction of, the mortgagor under such Loan upon delivery to the escrowee title company by Reliance (and notification by such escrowee title company to Continental of the excrowee's receipt of all such documents) on or before the date of such payment of all documents required to be delivered as the "Agent's Submission Package" under Sections I.A. or II.A. of an Agreement dated June 1, 1979 among Reliance, Continental and Chicago Title Insurance Company (herein called the "Closing Agreement"), a copy of which is attached hereto as Exhibit A, including all those items shown in the column called "after closing";

(d) All other documents or records with respect to such Mortgage Loan (which shall include, without limitation, (i) all writings which have been customarily furnished by Reliance to Continental with respect to single family residential mortgage loans sold by Reliance, (ii) all documents required to be delivered under Sections I.B. or II.B. of the Closing Agreement, and (iii) all other documents required for the final certification of a Government National Mortgage Association ("GNMA") pool into which such Mortgage Loan is placed) shall be furnished to Continental within five months after the date of the closing of such Mortgage Loan;

(e) The excess, if any, of the purchase price with respect to any Mortgage Loan owing to Reliance over the amount of the disbursements by Continental to the escrowee title company with respect to such Mortgage Loan shall be paid to Reliance by Continental on the first to occur of (i) delivery by the escrowee title company to Continental at its offices in

Chicago, Illinois of all of the documents for such Mortgage Loan required to be delivered under Section 1(c) hereof or (ii) the eighth day following the purchase of such loan;

(f) All of the documents required to be delivered under Section 1(c) hereof for each Mortgage Loan shall be delivered by the escrowee title company to Continental at its office in Chicago within 7 days after the closing of such Mortgage Loan; and

(g) All requirements contained in Sections V and VI of the Closing Agreement with respect to title insurance companies, title exceptions, hazard insurance companies, coverage, endorsements, and all agreements, warranties, undertakings and obligations of Reliance contained in Section VII of the Closing Agreement with respect to single family residential mortgage loans delivered thereunder are incorporated herein by reference with respect to each Mortgage Loan and shall apply to each purchase and sale of any Mortgage Loan hereunder as fully as if set forth herein.

2. *February FHA 245 Purchase.* Continental also agrees to purchase from Reliance (or any affiliate whose mortgages have been sold to Continental), at such times during February, 1980, and in such amounts, as Reliance may from time to time request, single family residential mortgage loans insured by the Federal Housing Administration (pursuant to Section 245) originated by Reliance ("Section 245 Loans") having an aggregate principal amount not in excess of $6,000,000, upon the same terms and conditions (and with the same obligations of Reliance) as are set forth with respect to Mortgage Loans in Section 1 hereof, except that the price to be paid with respect to each Section 245 Loan purchased shall be 96.5% of par.

3. *April Purchases and Sales.* Continental and Reliance agree that Continental will purchase from Reliance, on April 15, 1980, at Reliance's election and upon not less than 10 days prior written notice to Continental from Reliance, FHA-Insured (Section 203) or VA-Guaranteed single family

residential mortage loans originated by Reliance in March, 1980 ("March Mortgage Loans") having an aggregate principal amount at par not in excess of $3,000,000 at a purchase price equal to 97% of par, and single family residential FHA 245 Insured mortgage loans originated by Reliance during March, 1980 ("Section 245 March Loans") having an aggregate principal amount at par not in excess of $3,000,000 at a purchase price of 96% of par. The purchase price for such March Mortgage Loans and Section 245 March Loans shall be paid upon Reliance's delivery to Continental at its offices at Chicago, Illinois of completed loan packages containing each and all of the items required to be furnished at any time with respect to a loan of such type under Sections I.A. and I.B., II.A. and II.B. of the Closing Agreement, together with (without limitation) all other items required to be delivered with respect to a loan of such type, and upon satisfaction of all other conditions and provisions set out in, under Sections 1. and 2. hereof. The intent of this paragraph will be stated in a letter, if requested by Reliance, conforming to and confirming, the agreement contained in this paragraph.

4. *Continuing Delivery by and Obligations of Reliance.* Reliance acknowledges and agrees that it has been, is and will remain obligated to furnish to Continental all notes, mortgages or trust deeds, assignments, title insurance policies, FHA insurance or VA loan guarantee certificates, hazard insurance policies, closing statements, servicing files, escrow balances and any other item in the possession of Reliance and any other item required to be delivered by Continental prior to the final certification of a GNMA pool into which any single family mortgage loan previously purchased by Continental from Reliance or purchased by Continental hereunder (collectively, "Loans") has been placed. Attached hereto as Exhibit B is a schedule of the GNMA pools into which Continental has placed Loans purchased by it from Reliance through the date hereof. Reliance agrees that it will perform all delivery obligations with respect to such Loans already placed in GNMA pools prior to the dates shown under the column "Delivery Date" on Exhibit B and will perform all

delivery obligations with respect to other Loans not more than five months after the date of their origination. Nothing contained in this Agreement shall limit or affect in any manner any warranty or representation made by Reliance with respect to any Loan purchased by Continental prior to January 26, 1980, any obligation of Reliance contained in the Closing Agreement or any similar agreement with any other escrowee title company or any obligation of Reliance to repurchase, at the purchase price any Loan which is ultimately determined to be uninsurable or not guaranteeable by the FHA or the VA, or which cannot be finally certifiable in a GNMA pool.

5. *Account; Audit.* Continental shall advance, prior to February 6, 1980, such amounts as Reliance may request, not in excess of $1,000,000, as an advance on all purchases and sales of Loans through December 31, 1979 pending completion of an audit. Reliance and Continental agree that prior to Wednesday, February 6, 1980, they will each furnish to the other a statement of account for the purchases and sales of Loans made between them for the period from May 17, 1979 through December 31, 1979 and for the period for January 1, 1980 through January 25, 1980 (each herein called an "Accounting Period"), on a loan-by-loan basis, and that they will reconcile the balances for each Accounting Period separately, recognizing that Loans may, in some cases, have been given or allocated prices by Continental or Reliance under different accounting methods. Upon joint determination of the balance which is still due and owing to Reliance, or owed to Continental by Reliance as a result of any overpayment, Continental shall pay to Reliance, or Reliance shall pay to Continental, two-thirds of any balance owed or overpayment (representing the difference between the aggregate purchase prices for all Loans purchased during each Accounting Period and the aggregate disbursements made to or for the account of Reliance or mortgagors in connection with the origination of such Loans with respect to each such Accounting Period). Immediately following the completion of such accounting, Reliance and Continental shall commence separate audits,

Reliance using a firm of independent certified public accountants of recognized standing, of the purchase prices and advances and shall attempt in good faith to reconcile their audits within 30 days after the completion of their accounting. The remaining one-third of the balance owing or overpayment (as adjusted) shall be payable in full with respect to each Accounting Period upon completion of the reconciliation of their audits. In the event that such audits are not reconciled within such 30 day period, either party shall be entitled to submit such accounting to arbitration as provided in Section 8. The parties agree that any balance owing by Reliance to Continental, or by Continental to Reliance, with respect to the Accounting Period through December 31, 1979, based on the amount thereof of such balance from time to time outstanding as determined by the accountings or audits of the parties or by arbitration as provided in Section 8 hereof, will bear interest, beginning February 1, 1980 and continuing until paid (after determination by the accountings or audits of the parties or by arbitration as provided in Section 8 hereof) at the prime rate of Continental from time to time in effect. Such interest shall be due and payable upon final determination of the balance owing. The term "prime rate" shall mean the rate of interest from time to time announced by the Bank in Chicago, Illinois for unsecured 90–day commercial loans to large corporate borrowers of the highest credit standing.

6. *Continuing Collateral.* Pursuant to a Security Agreement dated May 17, 1979 (the "Security Agreement"), and pursuant to Escrow Instructions dated November 22, 1979 (the "October Escrow Agreement"), Continental has rights as a secured party with respect to certain property of Reliance including cash proceeds received by it as provided in the October Escrow Agreement. Reliance and Continental agree that such funds and other property, if any (together with any other funds or other property received by Continental pursuant to the October Escrow Agreement or the Security Agreement) shall be held by Continental (i) until all Loans which Continental has previously acquired from Reliance or

acquires from Reliance pursuant to this Agreement have been placed in GNMA insured pools which have been finally certified and (ii) until the audit and final determination provided in Section 5 has been concluded, either by agreement between the parties or by arbitration under Section 8 hereof. The obligations of Reliance hereunder are secured by Continental's rights under the October Escrow Agreement and the Security Agreement. Reliance and Continental agree that neither the October Escrow Agreement nor the Security Agreement nor the rights and obligations of Continental and Reliance thereunder shall be modified or affected in any way by this Agreement.

7. *Agreement and Release.* Reliance and Continental hereby agree that, except to the extent contained, provided for, confirmed or preserved in this Agreement (and except to the extent that Continental was a lender to Reliance prior to May 17, 1979), neither has any liability or obligation or commitment of any kind or character whatsoever to the other, and each hereby irrevocably remises, releases, settles and forever discharges the other, and its present and former shareholders, officers, employers, directors, agents, affiliates, successors and assigns, from any and all manner of actions, causes of action, suits, debts, dues, sums of money, accounts, reckonings, bills, covenants, contracts, controversies, agreements, promises, damages, judgments, executions, claims and demands whatsoever, in law or equity, which such party, its officers, directors, employees, agents, successors or assigns, have had, now have or hereafter can, shall or may have, against the other for or by reason of any matter, cause or thing whatsoever, except for the rights and obligations of the parties contained, provided for, confirmed or preserved in this Agreement (and except to the extent that Continental was a lender to Reliance prior to May 17, 1979). Without limiting the generality of the foregoing, Continental hereby releases, remises, and forever discharges Reliance from any and all claims, liabilities or damages arising out of or in connection with Reliance's intentional breach or violation of any duty under the Closing Agreement or any similar agreement

with any other title company escrowee. Without limiting the generality of the foregoing, Reliance hereby releases, and forever discharges Continental for any and all claims, liabilities, or damages of any kind arising out of: (i) any claim relating to any adjustment in prices for loans based on or relating to changes in interest rates; (ii) any obligation of any kind of Continental to purchase any mortgage loans from Reliance other than its obligations under Sections 1, 2 and 3 hereof; and (iii) any claim that the relationship between Reliance and Continental has been at any time anything other than an arm's-length relationship between a seller and purchaser of mortgage loans (except to the extent that Continental was a lender to Reliance in the ordinary course of business prior to May 17, 1979).

8. *Miscellaneous.* This Agreement and the settlements and releases provided for herein are not an admission of any allegation or claim asserted against either Reliance or Continental by the other, nor shall it constitute any admission by either of them of fault or liability of any kind with respect to any such allegation or claim, or of responsibility for any damage or loss of any kind resulting to any other entity or person, and this Agreement is made for the sole purpose of settlement, compromise and disposition of claims of each disputed by the other party and for no other purpose. The parties to this Agreement shall cooperate in taking all steps necessary to effect the intent hereof. This Agreement contains the entire agreement between the parties with respect to the subject matter hereof, and no amendment, modification or waiver of any provision hereof shall be effective in any event unless executed in writing by the President of Reliance and by a Vice President of Continental. The parties hereto acknowledge that each is acting based upon information which it has obtained independently of the other party and which it believes to be complete, and that neither is relying on any representation or undertaking of the other except as expressly contained in this Agreement. No right under this Agreement may be assigned to any person without the prior written consent of the other. If any notice is required to be

given by either party hereunder, it shall be deemed to have been given upon receipt of such notice by the other party at its address shown above, to the attention: in the case of Reliance, of Eugene J. Cahill, President, and in the case of Continental, of Douglas W. Hall, Vice President. Each party executing this Agreement represents to the other that he possesses full power and authority to execute this Agreement on behalf of the party represented by him and that this Agreement, and each provision thereof, will be the valid and binding obligation of such party. Each party has been advised by legal counsel in connection herewith, and contemporaneously with, and as a condition to, the execution and delivery hereof, each party shall deliver to the other an opinion of counsel representing it, to the effect that this Agreement has been duly authorized, executed and delivered after all corporate or other action of such party required therefor and constitutes its legal, valid and binding obligation. If any dispute arises under this Agreement with respect to any matter provided to be determined under Section 5 hereof, the parties agree that the same will be submitted to binding arbitration in the City of Chicago, Illinois in accordance with the rules of the American Arbitration Association then in effect, with the costs of such arbitration to be shared equally by the parties and with each party to bear its own costs and expenses.

IN WITNESS WHEREOF, the undersigned have executed and delivered this Settlement Agreement and Release at Chicago, Illinois on the date first above written.

RELIANCE MORTGAGE CORPORATION

By _____
President

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO

By _____
Vice President

CONTINENTAL BANK

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO
231 SOUTH LASALLE STREET, CHICAGO, ILLINOIS 60697

May 9, 1980

Reliance Mortgage Corporation
14 Inverness Drive East
Englewood, Colorado 80112

Attention: Eugene Cahill, President

Re: Settlement Agreement and Release
dated February 1, 1980

Gentlemen:

Please refer to a Settlement Agreement and Release (the "Agreement") dated February 1, 1980. This letter will confirm that the following have occurred pursuant thereto and that the following agreements have been made:

(i) Continental and Reliance agree ~~[that]~~, in connection with the purchases and sales provided for under Sections 1, 2 and 3 thereof, that, except for the continuing validity of all representations and warranties, and the continuing performance of all undertakings and obligations, contained or incorporated in Section 1(d) and 1(g) and Section 4 of the Agreement (with the understanding[s] that the ongoing delivery by Reliance of all documents and papers relating to such loans as required under the Agreement and the Closing Agreement (as defined in the Agreement) shall be made at the times set forth in this letter rather than the times specified in the Agreement, ~~[and]~~ that any references to Reliance's obligation to repurchase loans on the ground of "unpoolability" is limited to unpoolability resulting from the facts that such loans are not insurable or documents

have not been delivered, and that the duty to repurchase and the purchase price are modified hereunder), all obligations of Continental and Reliance with respect to such loans have been satisfied or are hereby waived and released.

(ii) In connection with Section 5 of the Agreement, an amount has been agreed to concerning all purchases and sales of loans (subject to adjustment in the event that amounts wired by Continental to title companies and believed by Continental and Reliance to have been returned to Continental or to be held for its benefit were not in fact so returned or are not so held). The procedures used in reaching such number differ from that described in Section 5, and the parties waive any procedures of said Section 5 that have not been followed. An accounting has been completed of the balance owing on all loans purchased from May 17, 1979 through December 31, 1979, and it is agreed that such balance is $808,190. Interest on such balance at Continental's prime rate from February 1, 1980 to the date hereof is agreed to be $38,943. Reliance hereby acknowledges receipt from Continental a cashier's check in the amount of $847,133 and agrees that [of] the purchase price for all loans acquired by Continental from Reliance at any time has been paid, including the purchase prices for all loans acquired from January 1, 1980 through January 25, 1980 [~~have been paid.~~] The parties hereby release each other from any other obligation or requirement contained in Section 5 and accept the figures set forth above as the joint determination provided for in Section 5.

Reliance and Continental additionally agree that those obligations and undertakings contained in the Agreement relating to (i) the time period within which Reliance is required to deliver all documents relating to loans purchased by Continental, including those required to be delivered for

final certification of all pools into which the Loans have been placed, (ii) the terms and conditions under which the funds held by Continental pursuant to the Security Agreement and the October Escrow Agreement may be released, and (iii) the obligation of Reliance to repurchase loans, and the purchase dates and purchase prices for Reliance's obligation to repurchase of those loans acquired by Continental from Reliance (and the terms and conditions under which such purchases will be required) are hereby modified, to the extent different in any respect from those provisions contained in the Agreement dealing with such matters, as follows:

(A) Reliance agrees to make delivery to Continental of all documents required to be delivered under the Agreement or the Closing Agreement (including corrected documents) as they become available and not less frequently than once each week. Reliance shall complete delivery to Continental of all documents required to be delivered to it under the Agreement, under any Closing Agreement (as defined in the Agreement) and any other document, record or writing required for the final certification of all GNMA pools into which any mortgage loan acquired by Continental from Reliance has been placed, on the earlier to occur of (i) 10 calendar days following receipt of each such document or (ii) on July 15, 1980 (it being understood that such delivery requirement relates to all mortgage loans acquired from Reliance). It is hereby agreed that Reliance's failure to deliver any document to Continental prior to the earlier of (i) July 15, 1980 or (ii) 10 calendar days after receipt of such document by Reliance shall be deemed to render the loan to which such document relates ineligible for inclusion in a GNMA pool to be finally certified, and Reliance shall be obligated to repurchase such loan from the pool into which it was placed at a price equal to par (which is the principal balance plus accrued interest pro rated to date of closing outstanding thereon), or, if the loan has not

been placed in a pool, at a price equal to the price paid by Continental to Reliance plus accrued interest pro rated to date of closing. Continental agrees to advise Reliance concerning any such loan [to be repurchased] by July 21, 1980. Failure by Continental to so advise prior to such date shall cause Continental to lose any rights to require repurchase.

(B) Continental agrees that it will return to Reliance for correction prior to May 15, 1980 any document relating to a mortgage loan acquired from Reliance in the possession of Continental and known to require correction on the date hereof. Continental agrees to complete review of all other documents now in its possession and return to Reliance for correction prior to June 15, 1980 any documents which require correction. Continental additionally agrees to forward to Reliance on or before June 15, 1980 a listing of loans with respect to which documents have not been received and a listing of such documents. In case any document delivered to Continental by Reliance after the date hereof requires correction, such document shall be returned by Continental to Reliance promptly, and in any event within ten days following receipt thereof by Continental. Reliance shall return any such document, corrected, to Continental within 30 days after receipt and in any event (except for documents which have been returned to Reliance for [~~execution initially delivered by Reliance~~] correction after June 15, 1980) by July 15, 1980. It is hereby agreed that Reliance's failure to deliver any such document, corrected, prior to [~~the earlier to occur of~~] (i) July 15, 1980 or (ii) 30 days after receipt of such document by Reliance, [as the case may be] shall be deemed to render the loan to which such document relates ineligible for inclusion in a GNMA pool to be finally certified, and Reliance shall be obligated to repurchase any such loan for the purchase price set forth in (A) above. In the event that Continental

fails to comply with ~~[this]~~ the schedule [provided in this letter] for the return of documents for correction, Reliance shall not be obligated to repurchase any such loan on the ground that any such uncorrected document rendered such loan ineligible for inclusion in a finally certified GNMA pool. In the event that Continental reports to Reliance that it has not received any document, Reliance agrees that, unless it has in its possession a receipt signed by Continental for such document, [it will] proceed to obtain duplicates or other documents, it being understood that if Continental had already received such document Reliance is entitled to be reimbursed in accordance with paragraph [8].

(C) In the event that on August 20, 1980, the documentation on any mortgage loan or loans acquired by Continental from Reliance and returned by Continental to Reliance for correction [in the time period set forth herein] has not been delivered to Continental corrected and in the form required for final certification of the GNMA pool in which such loan is placed, Reliance shall either purchase each such loan or loans from a pool into which placed or from Continental for a purchase price or deliver such documents, corrected to Continental prior to August 20, 1980.

(D) For purposes of determining delivery dates, Reliance and Continental agree to prepare detailed listings and transmittal letters, to forward all documents by Federal Express or equivalent carrier, to notify each other at the time of shipment of a group of documents and to acknowledge receipt of documents by signing and returning a copy of the transmittal (with any corrections, omissions or errors noted) within [two to three] business days' of the date of receipt. A failure to acknowledge by Continental shall preclude Continental from requiring Reliance to repurchase any loan on the ground of any

error in, or nondelivery of, any document shown on such transmittal (though it shall not affect the continuing obligation of Reliance to deliver and to correct documents). A failure to acknowledge by Reliance shall preclude Reliance from correcting any document shown on such transmittal and shall require Reliance to repurchase the loan to which such documents relate as if such documents were not corrected. For purposes of documents delivered on and after the date hereof, Continental shall not be required to examine for errors (or process) more than 150 documents or items per business day. If any delivery by Reliance to Continental contains more than such number of documents or items, the first 150 shall be deemed delivered on the date of receipt, the next 150 on the next business day and each additional 150 on each succeeding business day.

(E) (i) Upon the earlier to occur of (A) (i) full delivery to Continental by Reliance of all instruments and documents [requested to be corrected or] identified [in a timely manner] by the procedures outlined in this letter and required to be delivered before all loans acquired by Continental (except for loans which have been repurchased by Reliance hereunder) are eligible for inclusion in finally certified GNMA pools and (ii) payment to Continental of the purchase prices hereunder (toward payment of which Continental agrees there may be applied, to the extent permitted thereunder, the proceeds of collateral held by it under the Security Agreement and the October Escrow Agreement) for payment of all loans where instruments or documents have not been delivered or corrected and Reliance has duty to purchase or has exercised an option to purchase or (B) final certification of all GNMA pools into which the mortgage loans acquired by Continental from Reliance have been placed, the liabilities of Reliance to Continental secured by the Security Agreement and the October

Escrow Agreement shall be deemed fully performed and satisfied, and any funds or other collateral held by Continental shall be released and delivered, so long as Continental shall have no notice that any other person or entity has any interest therein so long as no court of competent jurisdiction has not ordered, to the contrary a: d so long as such delivery shall be permitted under the October Escrow Agreement, upon the joint written direction of Reliance, the Escrow Agent under the October Escrow Agreement and the other "Banks" who were parties thereto.

(ii) In connection with any obligation of Reliance to provide documents or corrected documents, Reliance may, at its option, repurchase the loan associated with the documents, at the price described in (A), rather than furnish the corrected or omitted documents.

(F) Reliance acknowledges that it is obligated to repurchase from Continental or from the pools into which placed, the mortgage loans listed or identified on Exhibit A for a purchase price equal to the purchase price equal to the purchase price under (A) above.

(G) The phrase "(and except to the extent Continental was a lender to Reliance prior to May 17, 1979)" appearing three times in Section 7 of the Agreement is hereby deemed deleted in the three places, and the release therein shall apply to tı `nsactions where Continental was a lender to Reliance ı rior to May 17, 1979.

(H) Continental agrees to reimburse Reliance for its out-of-pocket and employee compensation (including reasonable overhead) costs incurred by Reliance in obtaining unnecessary duplicate copies of document as a result of Continental's loss of documents. Upon presentation and review of proper supporting documentation

concerning the loss and Reliance's costs, Continental agrees to reimburse Reliance for these costs.

Except as hereby amended, Continental and Reliance hereby ratify and confirm the Agreement and agree that it is and remains in full force and effect, except as amended.

If the foregoing correctly sets forth our understanding, kindly sign and return one copy of this letter.

Very truly yours,

CONTINENTAL ILLINOIS
NATIONAL BANK
AND TRUST COMPANY
OF CHICAGO

By Douglas W. Hall
Vice President

Accepted and agreed to
this _____ day of May, 1980.

RELIANCE MORTGAGE
CORPORATION

By _____
President

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

Cause No. 82 C 2186 Date March 4, 1983

Title of Cause Reliance Mortgage Corp. v. Continental Illinois Nat'l Bank

Brief Statement of Motion Motion to Dismiss

Sent for Microfilming

MAR 3 1983

Filmed on

The rules of this court require counsel to furnish the names of all parties entitled to notice of the entry of an order and the names and addresses of their attorney. Please do this immediately below (separate lists may be appended).

Names and Addresses of moving counsel

Representing

Names and Addresses of other counsel entitled to notice and names of parties they represent.

DOCKETED

MAR 8 1983

Reserve space below for notations by minute clerk

For the reasons stated in the Memorandum filed herewith the motion to dismiss the amended complaint is granted and this case is dismissed.

DRAFT

RECEIVED

Hand this memorandum to the Clerk.
Counsel will not rise to address the Court until motion has been called.

UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

Name of Presiding Judge, Honorable George N. Leighton

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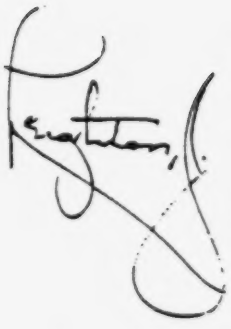

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Nonpublished Per Curima Ord
JUDGMENT — ORAL ARGUMENT

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

JANUARY 26, 1984

BEFORE
HON. WILLIAM J. BAUER,
CIRCUIT JUDGE
HON. JOEL M. FLAUM,
CIRCUIT JUDGE
HON. TERENCE T. EVANS,
DISTRICT JUDGE*

RELIANCE MORTGAGE CORPORATION,
A COLORADO CORPORATION,
Plaintiff-Appellant,

No. 83-1601

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
AN ILLINOIS CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 82 C 2186

Judge George N. Leighton

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED, with costs, in accordance with the order of this Court entered this date.

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* The Honorable Terence T. Evans, Judge of the United States District Court for the Eastern District of Wisconsin, is sitting by designation.

Rule 39. Costs

(a) *To Whom Allowed.* Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) *Costs For and Against the United States.* In cases involving the United States or an agency or officer thereof; if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) *Costs of Briefs, Appendices, and Copies of Records.* Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) *Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later.* A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate

has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) *Costs on Appeal Taxable in the District Courts.* Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

(As amended April 30, 1979, effective August 1, 1979.)